No. 80-860

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, TRUSTEE,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX and ALEX WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Pension Benefit Guaranty Corporation ("PBGC") may recover from all members of a group of trades or businesses under common control statutory reimbursement for the insufficiency arising from the termination of a pension plan subject to Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

2. Whether the application of employer liability provisions in Title IV of ERISA, 29 U.S.C. § 1362, to a pension plan terminated before December 31, 1975, is constitutional.

3. Whether the PBGC was required to consider a request for waiver of liability under Title IV of ERISA which was filed and received after the expiration of a statutory 270-day period during which the agency was authorized to grant such exemptions.

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 630 F.2d 4. The opinion of the district court is reported at 470 F.Supp. 945.

JURISDICTION

The decision of the court of appeals was issued on August 29, 1980. The petition for writ of certiorari was filed on November 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent sections of Title IV of ERISA involved in this case appear in the Appendix, pp. 1a-8a, *infra.*

STATEMENT

This case concerns a pension plan instituted in 1959 by Avon Sole Company ("Avon"), a Massachusetts shoe-sole manufacturing concern which went out of business in 1975, six-and-one-half years after it was purchased by Ouimet Corporation. At all relevant times, more than eighty percent of Ouimet Corporation's stock was held by Emil R. Ouimet, a Massachusetts resident who entered the business of manufacturing shoe parts more than forty years ago. The principal issue relates to whether Ouimet Corporation and other entities owned or controlled by Mr. Ouimet apart from Avon itself are liable to the Pension Benefit Guaranty Corporation ("PBGC") for the amount by which benefits statutorily guaranteed under Avon's pension plan exceeded the available assets of the pension fund at the time the pension plan was terminated. The question arises in the context of Avon's discontinuance of its manufacturing operations in March 1975 and its subsequent adjudication of bankruptcy.

1. The Pension Plan's Assets

Avon's pension plan was underfunded from the time it was first instituted, largely because credit was immediately given for employees' past years of service with no contribution having been made to provide for such credit (App. 103).[1] It continued to be underfunded in the following years, and by the time Ouimet Corporation purchased Avon in 1968, the fund was carrying approximately $92,000 in unfunded vested benefits (App. 102). The terms of the pension plan were known to Mr. Ouimet when the 1968 transaction was consummated (Supp. App. 213-214).

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[1] "App." refers to the Joint Appendix filed in the Court of Appeals. "Supp. App." refers to the Joint Supplemental Appendix in that court.

After Ouimet purchased Avon, management appointed by Mr. Ouimet participated in labor negotiations with representatives of the Avon employees. In the course of these negotiations, benefit increases were agreed upon. These increases were, however, not fully funded by the time of the plan's termination (App. 23, 103, 226-227).

Avon was exclusively responsible for funding the benefits promised under the agreement. It had full control over the rate at which money was accumulated to pay pensions and determined the pension fund's investments (App. 45-46, 103-104, 245; Supp. App. 224-225). Certain investments made by the fund resulted in a decrease in the market value of the fund's assets (App. 103). As of September 30, 1974, Avon's pension fund deficit—*i.e.*, its unfunded vested pension liabilities—had grown to $552,082 (Supp. App. 40).

When Avon ceased its operations in March 1975, the value of guaranteed pension benefits was $935,448, but the plan had only $383,108 in assets allocable to such benefits (App. 105). In addition, there were approximately $150,000 of vested severance benefits which are not guaranteed under federal law, and this amount has never been paid (App. 77; Supp. App. 152-153).

2. The Interrelationship Among the Petitioners

The petitioners in this case are Avon, four other business corporations, and a Massachusetts trust.[2] Besides Avon, they are the following:

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[2] The case, in its present posture, is a consolidation of a bankruptcy proceeding instituted in 1975 by petitions filed by Avon and its subsidiary Tenn-ERO Corporation (District Court Nos. 75-1520-HL and 75-1521-HL) and the civil suit instituted by the PBGC on April 2, 1976, together with an amended complaint, separately numbered, filed on July 16, 1976 (District Court Nos. 76-1314-T and 77-2005-T). Although the caption on the district court opinion contains only the numbers of the civil suit, it is clear that both proceedings were decided by the district court and

(a) *Tenn-ERO Corporation.*—A Massachusetts corporation which is a wholly owned subsidiary of Avon, formed in 1972 to operate a non-union plant in Tennessee. Tenn-ERO filed a Chapter XI bankruptcy petition in June 1975 simultaneously with Avon.

(b) *Ouimet Corporation.*—A Delaware corporation which owns all the stock of Avon. More than 90 percent of this corporation's stock is owned by Emil R. Ouimet (App. 49).

(c) *Ouimet Stay & Leather Company.*—A corporation engaged in the manufacture of shoe trim and shoe strippings which was originally purchased by Emil R. Ouimet in 1940 (Supp. App. 160). Eighty percent of the company's stock is controlled by Mr. Ouimet (App. 49).

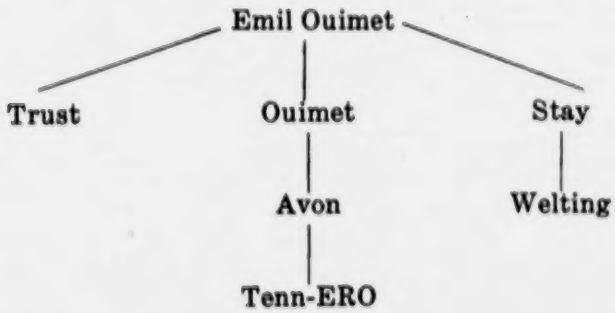
(d) *Ouimet Welting Company.*—A wholly owned dormant subsidiary of Ouimet Stay & Leather Company (App. 49), which is no longer engaged in manufacture.

(e) *The Emil R. Ouimet Wareham Trust*—A trust which owns the land on which the offices of Ouimet Stay & Leather are located (Supp. App. 164-165).[3]

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were before the court of appeals. Since Avon and Tenn-ERO are petitioners in this court (and they are parties *only* in the bankruptcy proceedings), the petitioners apparently are treating the proceedings as having been consolidated.

[3] The interrelationship of the various entities is shown on the following chart which was, in slightly different form, incorporated in the opinions of the bankruptcy judge and the district court:



Although each of these corporations and the trust, along with Avon, conducted its own day-to-day business, Emil Ouimet and his son Richard were the principal officers of all (App. 48). Emil Ouimet selected or approved the key operating personnel of all the companies and made all significant financial and policy decisions (Supp. App. 161, 167-169, 178-179, 200, 229-231). Professional and sales resources were also shared among the various entities (Supp. App. 166, 169, 174-176, 192-194, 219-220, 230).

The entities' finances were also intertwined. Ouimet Corporation guaranteed the obligations of Avon and of Tenn-ERO, Avon's subsidiary (Supp. App. 12-13). Mr. Ouimet also forestalled Avon's bankruptcy by personally paying $230,000 to one demanding creditor (Supp. App. 209, 220). In addition, Ouimet corporations frequently utilized, as needed, each other's available cash (Supp. App. 176-177).[4]

Consolidated federal tax returns were filed by Ouimet Corporation and its subsidiaries, Avon and Tenn-ERO (App. 47). The entire group of companies paid federal income taxes as a commonly controlled group (Supp. App. 69-126).[5]

3. The Proceedings Below

When Avon decided, in March 1975, to terminate its operations, it notified the PBGC as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), of the impending termination of its pension plan (App. 54). Almost three months after closing its doors, in June 1975, Avon and Tenn-

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[4] The companies' financial interrelationship was indicated by references in various of the financial statements. See Supp. App. 5, 11-14, 18, 24, 26-27, 44, 46, 52, 216-218.

[5] One company which was initially named by the PBGC but was subsequently excluded by stipulation was Brockton Plastics Corporation (App. 183).

ERO filed bankruptcy petitions in the United States District Court for the District of Massachusetts (App. 28).

In February 1976, the PBGC initially advised Avon that it was liable for an estimated $717,500 underfunding of its pension plan, and it filed a proof of claim in that amount with the bankruptcy court (App. 71). In the course of a subsequent investigation, the PBGC requested and received information concerning the other petitioners (App. 124). On the basis of this more complete investigation, the PBGC filed an amended proof of claim in the bankruptcy court on March 15, 1976, in the amount of $552,340 (App. 11-14). It also alleged that Avon was one of a group of affiliated companies which were jointly liable for the pension plan's deficit (App. 12). The PBGC sent demands to each of the affiliated corporations (App. 72-80). On March 22, 1976, Avon objected to the PBGC's amended claim (App. 20-22), and Ouimet Corporation and Ouimet Stay & Leather Company also filed an objection to the PBGC's claim (App. 23-25).

On March 22, 1976, Avon was judicially declared bankrupt (App. 122), and on April 2, 1976, the PBGC instituted the present proceeding against three of the Ouimet corporations in the United States District Court for the District of Massachusetts pursuant to Section 4003(e)(3) of ERISA, 29 U.S.C. § 1303(e)(3). The PBGC requested a judgment directing the petitioners to pay the PBGC $552,339.64 plus interest in satisfaction of their liability under Section 4062(b) and (c) of ERISA, 29 U.S.C. § 1362(b) and (c) (App. 151-155). Thereafter, on July 15, 1976, the PBGC determined that the Ouimet Trust should also be treated as an employer and joined it as a defendant (App. 156-157).

The district court appointed the Bankruptcy Judge as a special master to take evidence and make proposed findings and conclusions (App. 162-163). This order

effectively consolidated the bankruptcy proceedings and the PBGC's civil suit for disposition. *See* note 2, *supra*. Following twelve days of hearings, proposed findings and conclusions were issued by the special master on May 13, 1977, recommending that Avon and Tenn-ERO alone be held liable for the underfunded pension plan (Pet. App.[6] 22a-52a).

The PBGC sought modification of the master's report and moved for partial summary judgment before the district court. On March 2, 1979, the district judge (Tauro, J.) granted the PBGC's motion for partial summary judgment.[7] The district judge reasoned that the language of Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), which provides for treatment as a "single employer" of the employers of "all employees of trades or businesses (whether or not incorporated) which are under common control," governs liabilities under Section 4062(b) of ERISA, 29 U.S.C. § 1362(b). The court concluded (470 F.Supp. at 949):

> [W]hen one member of a controlled group terminates an underfunded pension plan, the entire group may be held liable by the PBGC for purposes of reimbursement under section 1362 . . . .

The district judge then certified his entry of partial summary judgment for interlocutory appeal under 28 U.S.C. § 1292(b) (App. 220). The court of appeals thereafter affirmed. It held that the "Ouimet Group," being under the common control of Emil R. Ouimet,

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[6] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari.

[7] The opinion of the district court is reported at 470 F.Supp. 945 (D. Mass. 1979).

should be treated as one employer for the purpose of 29 U.S.C. § 1362. The court said (Pet. App. 13a):

> We are not persuaded that, because only one of a group of corporations under common control contributes to a plan, it is unjust to make the group responsible for the plan's deficit. The facts of this case illustrate why such a group should be treated as an integrated whole. Ouimet purchased Avon with full knowledge of the plan and its funding requirements. Ouimet participated in the labor negotiations resulting in greater pension benefits that contributed to the deficit. The Ouimet group filed a consolidated tax return on which the Avon contributions were deducted. We see nothing unfair in treating the Ouimet Group as a single employer.

Relying upon this Court's decision in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 100 S. Ct. 1723 (1980), the court of appeals also rejected petitioners' claims that Title IV of ERISA did not apply to plans terminated lawfully before December 31, 1975 (Pet. App. 14a). And relying upon the constitutional ruling of the Court of Appeals for the Seventh Circuit in the *Nachman* case (592 F.2d 947), as to which this Court had denied certiorari (442 U.S. 940) and which this Court appeared to approve by liberal quotation in its *Nachman* opinion (100 S.Ct. at 1729, n. 12), the court of appeals rejected petitioners' constitutional challenge to Title IV's imposition of employer liability (Pet. App. 11a-15a).

ARGUMENT

1. Section 4062 of ERISA, 29 U.S.C. § 1362, governs the liability of an employer to the PBGC on termination of its pension plan, and Section 4068 of ERISA, 29 U.S.C. § 1368, establishes the specific means by which the PBGC may collect amounts due under the law. Both courts below agreed with the PBGC that the definition of the term "employer" provided in Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), governs the meaning of the word as used in the liability provisions of Section 4062 and 4068, 29 U.S.C. §§ 1362 and 1368. This conclusion is supported by the plain language of the law and by its policies, as shown in its legislative history.

(a) *Plain language.*—Title IV of ERISA, designated "Plan Termination Insurance," includes *all* the provisions subsequently codified in 29 U.S.C. §§ 1301-1368 (as well as several amendments to the Internal Revenue Code). Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), provides, in pertinent part (Pet. 4; emphasis added):

> *For purposes of this title*, under regulations prescribed by the [PBGC], all employees of trades or businesses (whether or not incorporated) *which are under common control* shall be treated as employed by a single employer and *all such trades and businesses as a single employer.*

The "title" so specified includes the provisions authorizing the PBGC to demand and sue for pension plan deficits. Thus the "common control" standard of Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), governs this action brought by the PBGC. Since all the petitioners are concededly "under common control," [8] the PBGC properly brought its collection action against all of them.

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[8] The petitioners contended in the district court that the Ouimet Wareham Trust was not a member of the controlled group, but that issue was resolved against them by the district judge (470

(b) *Policies of the Act.*—Imposing appropriate liability on employers who terminate their pension plans is an essential element of the statutory scheme contemplated by ERISA. It was clear to the architects of the 1974 law that it would defeat ERISA's remedial objectives if employers could, without suffering adverse economic consequences, terminate underfunded pension plans,[9] thereby causing employees to lose benefits not statutorily guaranteed and leaving the PGBC to make up the shortfall in guaranteed benefits. *See, e.g.*, remark of Congressman Erleborn, 120 *Cong. Rec.* H1140 (February 26, 1974) ("I do not think insurance will work without employer liability. . . ."); Statement of Senator Williams, 120 *Cong. Rec.* 15737, 15740 (August 22, 1974); H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 16 (1973); S.Rep. No. 93-383, 93d Cong., 1st Sess. 26 (1973).

Employer liability for underfunded pension plan terminations is essential to the achievement of the objectives of Title IV of ERISA. The prospect of liability encourages employers to continue their plans by deterring terminations of underfunded plans. If such terminations were not adequately discouraged, they would, in sufficient volume, destroy the program. That there would be such volume is inevitable, because termination without liability means the employer could transfer liabilities to PBGC without cost. The burden of each underfunded termination not reimbursed by the plan sponsor raises the premiums paid by all plans. The cumulative effects of a large number of underfunded plan terminations would raise these premiums to unacceptable levels. In addition,

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F.Supp. at 948-49). The issue was apparently abandoned by petitioners on appeal and has not been presented in the petition for a writ of certiorari.

[9] For purposes of this brief, an underfunded plan is one in which the assets are not sufficient to pay benefits guaranteed by PBGC under Title IV of ERISA.

underfunded terminations deprive employees of anticipated benefits beyond those guaranteed by Title IV of ERISA.

Imposing liability on all entities in a controlled group was Congress' method for preventing evasion of statutory liability through the manipulation of closely related business enterprises. The House Report made this clear when, in discussing liability under 29 U.S.C. § 1362, it specifically referred to the language of 29 U.S.C. § 1301(b) (H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 376 (1974)):

> In determining the employer who may be liable for insurance coverage losses of the [PBGC], all trades or businesses (whether or not incorporated) under common control are to be treated as a single employer. Trades or businesses under common control may, for this purpose, include partnerships and proprietorships as well as corporations.[10]

The decision of the courts below was, therefore, mandated by the language of the governing Act and by its legislative history. It was, in addition, consistent with the interpretation of the agency which has the statutory authority to administer the law and which was given jurisdiction, under Section 4001 of ERISA, 29 U.S.C. § 1301, to issue regulations further defining entities under "common control." *See, e.g., Environmental Protection Agency* v. *National Crushed Stone Ass'n*, No. 79-770, 49 U.S.L.W. 4008, 4013 (Dec. 2, 1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And this interpretation is also consistent and coextensive, as 29 U.S.C. § 1301(b) re-

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[10] The House Committee made the same point in its discussion of 29 U.S.C. § 1364 (H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 380 (1974)):

> In this regard, it should be noted that the affiliated employer rules are to apply in this area. That is, if one member of an affiliated group has employer liability, then that liability is to extend to the entire affiliated group.

quires, with the regulations issued by the Secretary of the Treasury under the Internal Revenue Code with regard to "commonly controlled trades or businesses" under Section 414(a) of the Internal Revenue Code. *See Treas. Reg.* § 11.414(c)-2, reproduced in note 14 of the opinion of the court of appeals (Pet. App. 9a). Since there is no conflict of decisions on this issue, there is plainly no basis for review by this Court of the principal issue litigated below.

2. The first question presented in the petition appears to seek a determination of the constitutional issue which this Court specifically excluded from its grant of certiorari in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 442 U.S. 940 (1979). This issue still does not deserve review.

Petitioners claim that in sustaining the constitutionality of the termination liability provisions of ERISA, as applied to Avon, the decision of the court below was in conflict with this Court's decisions in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Pet. 11-18). There is, in fact, no conflict. The court of appeals properly relied upon *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 14 (1976), in rejecting petitioners' claims.

First, this Court's rulings in *Alton* and *Allied* are both distinguishable because the statutes at issue in both cases imposed liability upon employers to provide further compensation "for services long since rendered and fully compensated . . . ." *Alton*, 295 U.S. at 354; *see also Allied*, 438 U.S. at 246-47. The termination insurance and liability provisions of ERISA, on the other hand, like the black-lung compensation statute involved in the *Turner Elkhorn* case, operate "not simply to increase or supplement a former employee's salary," but rather "to allocate to the [employer] an actual, measurable cost of his busi-

ness." *Turner Elkhorn*, 428 U.S. at 19. The employer defined by 29 U.S.C. § 1301(b) can never be liable for more than the benefits that have vested under the terms of the pension plan. In every case, then, the employer has already benefitted from the requisite number of years of service from an employee necessary to vest rights under the pension plan. ERISA ensures that employers do not evade their responsibilities for guaranteed pension rights by terminating underfunded plans.

Second, Congress in enacting Title IV of ERISA sought to remedy what it "perceived [as] a widespread problem of national importance." *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 592 F.2d 947, 961 (7th Cir. 1979), *aff'd*, 100 S.Ct. 1723 (1980). This contrasts with the absence of such overriding objectives in the cases cited by petitioners.[11]

The Courts of Appeals have consistently held that this application of ERISA is constitutional, and other Circuits, including the court below, have approved the distinctions of the *Alton* and *Allied* cases on which the Court

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[11] ERISA, unlike the Minnesota statute invalidated in *Allied*, contains provisions "revealing the congressional attempt to moderate the impact of the liability imposed." *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 592 F.2d at 962. *See, e.g.*, 29 U.S.C. § 1362(b) (limiting employer's liability in underfunded termination to 30% of its net worth); 29 U.S.C. § 1304(f)(4) (waiver of employer liability within 270 days of enactment permitted "to avoid unreasonable hardship"); 29 U.S.C. § 1367 (PBGC may allow "equitable and appropriate" deferred payment of employer liability). Petitioners contend that the court of appeals "disregards" this distinction by refusing to give employers "time to adjust to th[e] 'novel' concept" of PBGC recovery from all members of a group of trades or businesses under common control. Pet. 17-18. The provisions for adjustment to employer liability referred to above are, of course, applicable to petitioners. No reason is advanced why it was unreasonable for Congress to omit special, additional phase-in provisions for members of the class of employers to which petitioners belong.

of Appeals for the Seventh Circuit relied in its *Nachman* opinion. 592 F.2d at 958-963. *See In re Williamsport Milk Products Company, Inc. Retirement Plan for Salaried Employees*, 631 F.2d 726 (3d Cir. 1980); *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, No. 78-3269, Slip Op. at 21-27 (6th Cir. Nov. 12, 1980). The constitutional challenge has been uniformly rejected, and it does not warrant consideration by this Court.

3. A final issue raised by the petition is whether the PBGC erroneously refused to grant a waiver of liability under 29 U.S.C. § 1304(f)(4) (Pet. 24-25). The statute authorizes the issuance of a waiver "for *only* the first 270 days after September 2, 1974" (emphasis added). Although its actuarial consultant advised Avon to request such a waiver before May 30, 1975—when the 270-day period would expire—and although that firm drafted a letter for that purpose, Avon did not submit such a request within the deadline. Avon's waiver request, dated June 5, 1975, was received nine days after the deadline expired, and the PBGC concluded that it had no statutory authority to grant a waiver after the 270-day period (App. 46, 64-66, 68-70). The decision on which petitioners rely in this portion of their petition, *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, 456 F.Supp. 545 (N.D. Ohio 1978), was reversed on November 12, 1980, by the Court of Appeals for the Sixth Circuit. *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, No. 78-3269 Slip Op. (6th Cir. Nov. 12, 1980). The Sixth Circuit held that a waiver was appropriate under 29 U.S.C. § 1304(f)(4) "only if the employer can demonstrate unreasonable economic harm." Slip Op. at 20. The issue of timeliness of a waiver application was not, in any event, involved in the *A-T-O* case. On the waiver-of-liability question, therefore, the decision below was correct and, in any event, it presents no issue deserving review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

The Pertinent Sections of Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.*:

§ 1301. Definitions

* * * *

(b) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of title 26.

§ 1303. Operation of corporation

* * * *

(e) Civil actions by corporations; jurisdiction; process; expeditious handling of case; costs

* * * *

(3) The district courts of the United States shall have jurisdiction of actions brought by the corporation under this subchapter without regard to the amount in controversy in any such action.

§ 1304. Temporary authority for initial period

* * * *

(f) Additional corporate powers during 270-day initial period

In addition to its other powers under this subchapter, for only the first 270 days after September 2, 1974, the corporation may—

* * * *

(4) waive the application of the provisions of sections 1362, 1363, and 1364 of this title to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan.

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

(b) Amount of liability

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

(c) Net worth of employer

For purposes of subsection (b) (2) of this section the net worth of an employer is—

(1) determined on whatever basis best reflects, in the determination of the corporation, the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer, and

(2) increased by the amount of any transfers of assets made by the employer determined by the corporation to be improper under the circumstances, including any such transfer which would be inappropriate under the Bankruptcy Act [11 U.S.C. 1 et seq.] if the employer were the subject of a proceeding under that Act.

(d) Corporate reorganizations

For purposes of this section the following rules apply in the case of certain corporate reorganizations:

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the partent corporation shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

(e) Cessation of operations at one facility

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 1363, 1364, and 1365 of this title shall apply.

§ 1364. Liability of employers on termination of plan maintained by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 of this title except that the amount of the liability determined under section 1362(b)(1) of this title with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction—

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the liimtation described in section 1362(b)(2) of this title shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

§ 1368. Lien for liability of employer

(a) Creation of lien

If any employer or employers liable to the corporation under section 1362, 1363, or 1364 of this title neglect or refuse to pay, after demand, the amount of such liability (including interest), there shall be a lien in favor of the corporation upon all property and rights of property, whether real or personal, belonging to such employer or employers.

(b) Term of lien

The lien imposed by subsection (a) of this section arises on the date of termination of a plan, and continues until the liability imposed under section 1362,

1363, or 1364 of this title is satisfied or becomes unenforceable by reason of lapse of time.

(c) Priority

(1) Except as otherwise provided under this section, the priority of the lien imposed under subsection (a) of this section shall be determined in the same manner as under section 6323 of title 26. Such section 6323 shall be applied by substituting "lien imposed by section 4068 of the Employee Retirement Income Security Act of 1974" for "lien imposed by section 6321"; "corporation" for "Secretary or his delegate"; "employer liability lien" for 't'ax lien"; "employer" for "taxpayer"; "lien arising under section 4068(a) of the Employee Retirement Income Security Act of 1974" for "assessment of the tax"; and "payment of the loan value is made to the corporation" for "satisfaction of a levy pursuant to section 6332(b)"; each place such terms appear.

(2) In the case of bankruutcy or insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of the Bankruptcy Act [11 U.S.C. 1 et seq.] or section 191 of title 31.

(3) For purposes of applying section 6323(a) of title 26 to determine the priority between the lien imposed under subsection (a) of this section and a Federal tax lien, each lien shall be treated as a judgment lien arising as of the time notice of such lien is filed.

(4) For purposes of this subsection, notice of the lien imposed by subsection (a) of this section shall be filed in the same manner as under section 6323 (f) and (g) of title 26.

(d) Civil action; limitation period

(1) In any case where there has been a refusal or neglect to pay the liability imposed under section 1362, 1363, or 1364 of this title, the corporation may bring civil action in a district court of the United States to enforce the lien of the corporation under this section with respect to such liability or to subject any property, of whatever nature, of the employer, or in which he has any right, title, or interest to the payment of such liability.

(2) The liability imposed by section 1362, 1363, or 1364 of this title may be collected by a proceeding in court if the proceeding is commenced within 6 years after the date upon which the plan was terminated or prior to the expiration of any period for collection agreed upon in writing by the corporation and the employer before the expiration of such 6-year period. The period of limitations provided under this paragraph shall be suspended for the period the assets of the employer are in the control or custody of any court of the United States, or of any State, or of the District of Columbia, and for 6 months thereafter, and for any period during which the employer is outside the United States if such period of absence is for a continuous period of at least 6 months.

(e) Release or subordination

If the corporation determines, with the consent of the board of directors, that release of the lien or subordination of the lien to any other creditor of the employer or employers would not adversely affect the collection of the liability imposed under section 1362, 1363, or 1364 of this title, or that the amount realizable by the corporation from the property to which the lien attaches will ultimately be increased

by such release or subordination, and that the ultimate collection of the liability will be facilitated by such release or subordination, the corporation may issue a certificate of release or subordination of the lien with respect to such property, or any part thereof.